

The Honorable Mary K. Dimke

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

JOHN DOE,

Plaintiff,

v.

THE BOARD OF TRUSTEES OF
WHITMAN COLLEGE, a non-profit
corporation,

Defendant.

No. 4:23-cv-05051-MKD

DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING
ORDER

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I. INTRODUCTION

Plaintiff seeks a temporary restraining order (TRO) compelling Whitman College to reinstate him as a student after an investigation, hearing, and appeal resulted in a determination that he had violated Whitman's policy prohibiting sexual misconduct. Plaintiff is not likely to succeed on the merits of his claims to obtain the extraordinary remedy he seeks. Plaintiff's complaint and motion reflect disagreement outcome of Whitman's Title IX process, but lack facts that would provide the court with the basis to issue a TRO. Because it necessarily finds a party responsible or not responsible, the Title IX student conduct process almost always leads to one party believing the outcome is wrong. As court decisions make clear, respondent claims are not viable when no allegation plausibly gives rise to an inference of discrimination based on respondent's sex. And no allegation or fact here does so here.

A college has an obligation to enforce its standards of conduct and through its thorough multi-step process assess the consequence for sexual misconduct. Plaintiff's argument that the Complainant has left college so a lesser sanction should now be assigned is not a basis to adjust the sanction through a TRO – indeed doing so has consequences with respect to the Complaint's right to know the sanction and Whitman's ability to address allegations of sexual misconduct. As described below, the facts and legal standards show that plaintiff is not entitled to a TRO and his motion should be denied.

II. FACTUAL BACKGROUND

A. WHITMAN'S SEXUAL HARASSMENT POLICY PROVIDES PARTIES A FULL AND FAIR PROCESS.

Consistent with its obligations under Title IX, 20 U.S.C. §§ 1681-1688, Whitman maintains a written Sexual Harassment Policy that describes its

1 process for responding to reports of sexual harassment, discrimination,
 2 misconduct, and retaliation in its community. Declaration of Cassandre Beccai in
 3 Support of Defendant’s Opposition to Plaintiff’s Motion for Temporary
 4 Restraining Order (hereinafter “Beccai Decl.”), ¶ 2, Ex. A. The Sexual
 5 Harassment Policy sets out detailed internal policies and procedures as well as
 6 rights and responsibilities of community members to “ensure compliance with
 7 federal and state civil rights laws and regulations, and to affirm its commitment to
 8 promoting the goals of fairness and equity in all aspects of the educational program
 9 or activity.” Declaration of John Doe in Support of Motion for Temporary
 10 Restraining Order (hereinafter “Doe Decl.”), Exhibit 6 at 8. The procedures reflect
 11 that Whitman “values and upholds the equal dignity of all members of its
 12 community and strives to balance the rights of the parties in the grievance process
 13 during what is often a difficult time for all those involved.” Doe Decl., Ex. 6 at 8.

14 The procedures ensure parties significant process, including
 15 (1) written notice of the allegations and process; (2) investigation by a neutral
 16 investigator; (3) hearing with witnesses and advisors in front of a neutral panel;
 17 and (4) opportunity to appeal the decision to a separate, neutral panel. Doe Decl.,
 18 Ex. 6 at 24-37. Throughout the investigation and hearing process, all parties are
 19 provided the same full and fair opportunity to suggest witnesses and questions, to
 20 provide evidence and expert witnesses, and to fully review and respond to all
 21 evidence on the record. *Id.*

22 **B. WHITMAN FOLLOWED ITS POLICY AFTER RECEIPT OF A**
 23 **REPORT OF SEXUAL ASSAULT BY PLAINTIFF.**

24 In April 2022, Whitman received a report from Complainant alleging
 25 that plaintiff engaged in multiple instances of nonconsensual sexual and physical
 26

1 conduct towards Complainant during the Fall 2019 semester while they were
2 dating, including the following:

- 3 1. Slapping Complainant
- 4 2. Grabbing Complainant's Face, Leaving a Bruise
- 5 3. Choking Complainant
- 6 4. Using Physical Power, Including Shoving Complainant against a Wall
- 7 5. Grabbing Complainant's Hair
- 8 6. Using Threats
- 9 7. Using Verbal Pressure
- 8 8. Putting His Hands Inside Complainant
- 9 9. Subjecting Complainant to Nonconsensual Oral Sex
- 10 10. Engaging in Nonconsensual Sex with Complainant

10 Doe Decl., Ex. 3 at 2. Whitman determined that the concerns, if true, would
11 constitute prohibited conduct. Beccai Decl., Ex. B (Notice of Allegations and
12 Investigation). In response, Whitman initiated the procedures described in the
13 Sexual Harassment Policy to investigate, hear, and consider the evidence,
14 including the following:

- 15 • **Notice of Allegations and Investigation:** On May 19, 2022, Whitman
16 provided plaintiff with a Notice of Investigation and Allegations that
17 described the allegations by Complainant and the process that would follow
18 and attached the Sexual Harassment Policy. Beccai Decl., Ex. B.
- 19 • **Engagement of a Neutral Investigator and Investigation Process:**
20 Whitman's Sexual Harassment Policy provides for a "thorough, reliable,
21 impartial, prompt, and fair" investigation during which the investigator will
22 "gather, assess, and synthesize evidence." Doe Decl., Ex. 6 at 30. Whitman
23 retained an outside, third-party investigator, Trish Murphy of Northwest
24 Workplace Law, to conduct an impartial investigation of Complainant's
25 allegations. Beccai Decl., ¶ 4. Murphy conducted an extensive
26 investigation, during which Complainant and plaintiff were interviewed

multiple times in addition to eleven other witnesses. Doe Decl., Ex. 1 at 4-6. All interviewees, including witnesses, were provided a copy of their transcript from their respective interviews and an opportunity edit, add, or adjust as needed. Doe Decl., Ex. 1 at 5.

- **Opportunity to Review and Submit Relevant Evidence:** Both parties reviewed the interview transcripts, documentation gathered in the investigation, and an initial version of the investigation report, and they were each provided the same time to submit a response. Doe Decl., Ex. 1 at 6. On November 17, 2022, following receipt of the full draft report, plaintiff and his Advisor emailed Murphy and Whitman's Title IX Coordinator, Cassandre Beccai, to request an expert psychologist witness testify at the hearing regarding Complainant's mental health and to discuss the impact of Complainant's bipolar disorder on the credibility of Complainant's allegations of sexual assault and dating violence. Doe Decl., Ex. 2 at 4. Plaintiff was informed that he could include the request in his response to Murphy who would make a relevancy determination and that his request would also be later shared with the hearing officer. Beccai Decl., ¶ 5. Per Whitman's process, the outside investigator reviews the submissions, incorporates any relevant evidence from the parties' submissions into the report, and any evidence not incorporated is still attached and provided to the hearing panel as an appendix. Doe Decl., Ex. 1 at 6-7. Both parties submitted written responses that were considered by the outside investigator, and plaintiff's response did include his request for expert psychologist testimony, but plaintiff offered little explanation as to why the evidence would be relevant. Doe Decl., Ex. 1 at 6-7. Within the discretion described in the Sexual Harassment Policy, Murphy reviewed plaintiff's request and

determined that such evidence would not be relevant to the allegations. Plaintiff's response incorporating his request for additional evidence was nonetheless included in the appendices to the investigation report, which was later provided to members of the hearing panel. Doe Decl. Ex. 1 at 6. The sixty-six-page investigation report, not including appendices, synthesizes the relevant evidence received by Murphy. Doe Decl., Ex. 1.

- **Hearing in front of Panel with Advisors and Cross-examination:** On January 20, 2023, a hearing was held via videoconference in front of a three-person panel that included Joseph Vincent (a non-Whitman employee, third-party panelist), Melissa Clearfield (Chair of the Department of Psychology at Whitman), and Noah Leavitt (Director of the Career Center at Whitman) (together, the "Hearing Panel"), none of whom had previous involvement in the case. Doe Decl., Ex. 3 at 1; Beccai Decl., ¶ 6. Plaintiff and Complainant and their advisors attended the hearing, answered questions asked of them in direct examination and cross-examination conducted by the parties' advisors. Doe Decl., Ex. 3 at 1.
- **Issuance of Statement of Finding, Final Determination, and Rationale:** After reviewing all the evidence, including the interviews, witness statements, and evidence contained in the investigation report and appendices, and the testimony at the hearing, on February 13, 2023, the panel issued its Statement of Finding, Final Determination, and Rationale Form ("Statement of Findings") reflecting their thorough review, consideration of credibility of the parties and numerous witnesses, and their ultimate deliberation and application of the evidence against the preponderance of the evidence standard. Doe Decl., Ex. 3.

1 The Hearing Panel determined that a preponderance of the evidence
2 supported a finding that plaintiff was responsible for five policy violations. Three
3 of the five policy violations related to dating violence, including Charge 2
4 (Grabbing Complainant's Face, Leaving a Bruise), Charge 4 (Using Physical
5 Power, Including Shoving Complainant Against a Wall), and Charge 5 (Grabbing
6 Complainant's Hair).

7 The Hearing Panel also found plaintiff had violated the portion of the
8 policy prohibition on forcible rape, which is defined therein as "penetration, no
9 matter how slight, of the vagina or anus with any body part or object, or oral
10 penetration without the consent of the complainant." Doe Decl., Ex. 6 at 17. First,
11 the Hearing Panel determined that a preponderance of the evidence supported that
12 plaintiff was responsible for subjecting Complainant to nonconsensual oral sex,
13 and specifically that plaintiff "forced Complainant to perform oral sex on
14 Respondent despite Complainant's express desire not to perform oral sex on
15 Respondent" as well as that plaintiff "forcibly ejaculated in Complainant's mouth,
16 despite Complainant's express objections and without Complainant's consent."
17 Doe Decl., Ex. 3 at 10-11. Second, the Hearing Panel determined that the
18 preponderance of the evidence supported a conclusion that Complainant did not
19 consent to sexual intercourse of their own volition and that plaintiff "used coercive
20 force to engage in sexual penetration of Complainant." Doe Decl., Ex. 3 at 13.

21 The Statement of Findings includes a detailed discussion of the
22 Hearing Panel's analysis of the evidence on each charge, which relies significantly
23 on the testimony of the multiple other witnesses and was corroborated by evidence
24 separate from addition to Complainant's assertions. Doe Decl., Ex 3 at 10-11. The
25 Statement of Findings reflects that it is not a pure "he said/she said" dispute that
26 relies solely on the credibility of the complainant versus the respondent. The

1 Hearing Panel relied on evidence and testimony from other witnesses to sustain the
 2 charges. For example, in sustaining Complainant's allegation that plaintiff would
 3 aggressively grab Complainant while they were intimate, the Hearing Panel
 4 considered that the allegation was corroborated through direct observation of a
 5 bruise on Complainant's face and contemporaneous conversations about the source
 6 of the bruise through testimony by five witnesses, including witnesses generally
 7 adversarial to Complainant's claims. Doe Decl., Ex. 3 at 4.

8 The Hearing Panel determined the sustained policy violations relate to
 9 some of the most egregious forms of conduct prohibited by Whitman and that
 10 plaintiff should be expelled from Whitman. Doe Decl., Ex. 3 at 13. On
 11 February 23, 2023, plaintiff through his legal counsel, submitted a Notice of
 12 Appeal with four asserted grounds that mirror the procedural issues on which
 13 plaintiff now bases his four claims. Doe Decl., Ex. 4. A new, separate panel (the
 14 "Appeal Panel") reviewed the appeal. That Appeal Panel included three Whitman
 15 employees, Rebecca Hanrahan (Associate Professor of Philosophy and the Appeal
 16 Chair), John Johnson (Vice President for Diversity and Inclusion), and Andrew
 17 Johnson (Associate Director of Residence Life and Housing), none of whom had
 18 any prior involvement in the case. Doe Decl., Ex. 5; Beccai Decl., ¶ 7.

19 The Appeal Panel reviewed plaintiff's appeal request, considered
 20 allowable grounds for appeal, the bases offered by plaintiff, and engaged in a
 21 thorough and objective review of the Notice of Appeal, responses from the Hearing
 22 Chair, the Complainant, and plaintiff, the Sexual Harassment Policy, and the
 23 records used to render the original decision. Doe Decl., Ex. 5. Following its
 24 review, the Appeal Panel concluded that the items asserted by plaintiff were not
 25 procedural irregularities, noting that it is within the Hearing Chair's role to decide
 26 what evidence is relevant. Doe Decl., Ex. 5. The Appeal Panel further found that

1 it is well within the role of the Hearing Panel to assess the credibility of statements
 2 of witnesses and that there was nothing in the Credibility Consideration section of
 3 the investigation report that would be considered a conclusion as opposed to a
 4 synthesis of the evidence, as is permitted. Doe Decl., Ex. 5. The sanction assigned
 5 by the Hearing Panel was upheld, and plaintiff was dismissed from Whitman
 6 effective March 28, 2023. Doe Decl., Ex. 5; Beccai Decl., ¶ 8.

7 III. ARGUMENT

8 A. THE STANDARD FOR OBTAINING A TRO IS EXACTING.

9 The standard for issuing a TRO is generally the same as the standard
 10 for obtaining a preliminary injunction. *See New Motor Vehicle Bd. of Cal. v.*
 11 *Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977). Both a TRO and a preliminary
 12 injunction are “extraordinary remed[ies] that may only be awarded upon a clear
 13 showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def.*
 14 *Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain this relief, a party must
 15 demonstrate (1) that he is likely to succeed on the merits, (2) that he is likely to
 16 suffer irreparable harm in the absence of preliminary relief, (3) that the balance of
 17 equities tips in his favor, and (4) that an injunction is in the public interest (the
 18 “*Winter* Factors”). *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009)
 19 (citing *Winter*, 555 U.S. at 20).¹

22 ¹ When the balance of equities tips “sharply” in the plaintiff’s favor, an injunction
 23 may be issued if there are “serious questions going to the merits,” but only
 24 assuming the plaintiff also satisfies the two other *Winter* factors. *Wilkinson v.*
 25 *Rodgers*, No. 1:23-CV-3035-TOR, 2023 WL 2562387, at *2 (E.D. Wash. Mar. 17,
 26 2023) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th
 Cir. 2011)). A “serious question going to the merits” is not met by simply raising
 questions or bringing allegations but one on which the movant “has a fair chance
 of success on the merits.” *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d
 1415, 1421 (9th Cir. 1984).

1 A “prohibitory injunction preserves the status quo.” *Stanley v. Univ.*
 2 *of So. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994). An injunction is “mandatory”
 3 when it “orders a responsible party to take action.” *Marlyn Nutraceuticals, Inc. v.*
 4 *Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009) (quotations
 5 omitted). Mandatory injunctions are “not granted unless extreme or very serious
 6 damage will result and are not issued in doubtful cases or where the injury
 7 complained of is capable of compensation in damages.” *Id.*, 571 F.3d at 879
 8 (citations and quotations omitted). Courts in this Circuit have in some cases held a
 9 request to be readmitted to be prohibitory injunctive relief, but those cases arise out
 10 of academic dismissals, not dismissals after sustained sexual misconduct. *See, c.f.*,
 11 *Doe v. Samuel Merritt Univ.*, 921 F. Supp. 2d 958, 961 (N.D. Cal. 2013).

12 It does not maintain the status quo to issue an injunction compelling
 13 Whitman to readmit a student who was dismissed after a thorough investigation,
 14 hearing, and appeal that found him responsible for serious sexual misconduct
 15 towards another student. It would instead compel a private college to invite
 16 someone back into its community after considerable process that followed its
 17 policies and found him responsible for engaging in serious misconduct as defined
 18 by its policies. Whether a request for mandatory relief of prohibitory relief,
 19 plaintiff cannot meet the standard for a TRO.

20 **B. PLAINTIFF IS NOT LIKELY TO SUCCEED ON THE MERITS OF**
 21 **HIS CLAIMS.**

22 1. Plaintiff Cannot Make a Showing He Is Likely to Succeed on His
 23 Title IX Claim.

24 To successfully bring a claim under Title IX under the theory that
 25 gender is a motivating factor in a college’s discipline, a plaintiff must show facts
 26 that, if true, raise a plausible inference that the college discriminated against the

1 plaintiff on the basis of his sex. *Schwake v. Arizona Board of Regents*, 967 F.3d
 2 940, 947 (9th Cir. 2020) (citations omitted). In the Ninth Circuit, a plaintiff must
 3 provide facts that establish not only background indicia of gender bias—including
 4 facts that would qualify as external pressure on a college regarding Title IX and
 5 internal patterns of practice of bias against male students at a college—but also that
 6 identify specific instances in his own disciplinary proceeding, including procedural
 7 irregularities, that are rooted in gender bias. *See Doe v. Regents of University of*
 8 *California*, 23 F.4th 930, 936-940 (9th Cir. 2022).

9 Importantly, in *Schwake* and *Regents*, the plaintiffs were not seeking
 10 the extraordinary remedy of a TRO. Instead, the court was ruling on a defendant's
 11 motion to dismiss the complaint, which requires a plaintiff to meet a less exacting
 12 standard of pleading. To obtain the TRO plaintiff seeks, the standard is rigorous.
 13 Plaintiff must not only bring the types of facts identified by *Regents* and *Schwake*,
 14 but he must also establish that he likely to succeed on the merits of his claims.

15 Plaintiff has not done so. As an initial issue, plaintiff does not
 16 identify the kind of non-conclusory, relevant factual allegations the Ninth Circuit
 17 has found to demonstrate background indicia of gender bias. *Regents*, 23 F.4th
 18 at 938. Plaintiff also fails entirely to make the necessary showing of specific
 19 instances of bias in his individual case that courts in this Circuit have required.
 20 Plaintiff cites the *Schwake* and *Regents* cases, but those plaintiffs alleged detailed
 21 and specific facts suggesting gender bias in their individual conduct cases. As an
 22 example, in *Regents*, the male respondent plaintiff alleged that the university's
 23 Title IX Coordinator told him—while the investigation was pending—that “no
 24 female has ever fabricated allegations against an ex-boyfriend in a Title IX
 25 setting.” 23 F.4th at 939. The *Schwake* plaintiff alleged that the university made a
 26 series of serious procedural errors that resulted in a fundamental deprivation of

1 process, including that they refused to provide written information about the
 2 complainant's allegations against him. 967 F.3d at 951. Here, plaintiff's
 3 allegations reflect only disagreement with the decision-making and the outcome of
 4 the process that found he was responsible for certain violations. They do not come
 5 close to establishing procedural irregularities or that Whitman's decision to find
 6 him responsible was motivated by his sex.

7 a. *Plaintiff fails to identify facts that establish sufficient*
 8 *background indicia of sex discrimination.*

9 The bulk of plaintiff's allegations of external pressure relate to
 10 outdated federal guidance from 2011 to 2014. Specifically, plaintiff relies on the
 11 2011 Dear Colleague Letter issued under the Obama administration along with
 12 2014 Q&A issued by the Office of Civil Rights, both of which have been formally
 13 rescinded. Following the promulgation of the 2020 Title IX regulations under the
 14 Trump Administration, which are effective August 1, 2020, these documents are
 15 no longer applicable guidance, have no application to the process applied by
 16 Whitman, and have no application to Whitman's obligations to comply with
 17 Title IX. In fact, the Sexual Harassment Policy states that it arises out of and is
 18 compliant with the 2020 Title IX Regulations, which incorporate significant
 19 changes to the Title IX obligations and substantial protections for respondents
 20 since the Obama-era guidance. The 2011 DCL may have held some weight with
 21 the Ninth Circuit in *Regents* because the underlying conduct and process in that
 22 case occurred around 2017, when university processes were still guided by the
 23 2011 DCL and not the Trump-era 2020 Title IX regulations.

24 Plaintiff is no more successful in establishing internal patterns or
 25 practice of bias against male students at Whitman. The student-written articles on
 26 which plaintiff relies only advocate for supportive environments for survivors of

1 sex assault and for colleges to take steps to prevent sexual assault on campus.
 2 They don't mention sex or gender. So, to accept these articles as evidence of anti-
 3 male bias one has to accept that only women can be victims of sexual assault. But
 4 of course, both men and women can be subjected to sexual assault. These articles
 5 are not evidence of anti-male bias; they are gender-neutral on their face.

6 Plaintiff also asserts that Whitman's process discriminates against
 7 male students based on an alleged disproportionate gender breakdown of
 8 complainants and respondents of sexual assault. However, a bare allegation that
 9 respondents are more often male does not raise gender bias by a college. *See, e.g.,*
 10 *Austin v. Univ. of Oregon*, 2017 WL 4621802 at *6 (D. Or. June 7, 2017) *aff'd*,
 11 925 F.3d 1133 (9th Cir. 2019). Allegations that the Complainant in this case
 12 pressured Whitman are also not evidence of internal pattern or practice of anti-
 13 male bias. As demonstrated by plaintiff bringing this lawsuit, a college can face
 14 criticism from both men and women participants in its student conduct process.

15 b. *Plaintiff's allegations about his disciplinary proceeding do not*
 16 *suggest bias based on sex.*

17 Plaintiff lists five items that he wrongly categorizes as procedural
 18 irregularities. For each, he argues he was denied the same opportunity as
 19 Complainant to present evidence and that such a denial was based on his sex. This
 20 is simply inaccurate. Each item is an instance of a Whitman employee or a neutral
 21 third-party exercising decision-making as to the credibility of a witness or the
 22 relevancy of evidence within the described student conduct process, within their
 23 discretion, and without regard to sex. Plaintiff just disagrees with their decisions.

24 To comply with the Title IX regulations, college officials must make
 25 relevancy determinations during conduct processes. The regulations provide that
 26 the investigator will complete a report that will "fairly summarize *relevant*

evidence,” and at the hearing, “[o]nly *relevant* cross-examination and other questions may be asked of a party or witness.” 34 CFR §106.45(5)(vii) and §106.45(6)(i) (emphasis added). Further, “[b]efore a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) *must first determine whether the question is relevant.*” 34 CFR §106.45(6)(i) (emphasis added). Whitman provided a fair process in which plaintiff and Complainant had the same opportunities to present relevant evidence. Each of plaintiff’s proffered bases is set forth and addressed separately below.

- (1) *It is not procedural error or evidence of anti-male bias to find testimony from plaintiff’s other sexual partners that he did not sexually assault them not relevant.*

Plaintiff’s assertion that he could not offer “competing evidence” is inaccurate and, regardless, is not procedural error. Plaintiff sought to have his other sexual partners testify that he did not sexually assault them during their unrelated and separate sexual encounters. After consideration, Whitman officials determined that such evidence was not relevant to assess the conduct violations alleged by the Complainant. This determination is not a procedural error.

Plaintiff points to the Hearing Panel’s consideration of testimony from Witness C, who reported to Murphy that plaintiff used similar methods of force to compel her to engage in sexual activities. But as set forth in the Statement of Findings, the evidence that came in related to Witness C was one of several pieces of evidence considered by the Hearing Panel to assess the credibility of the Complainant’s allegations related to specific types of force alleged to have been used by plaintiff during sexual acts, including hair pulling, to compel oral sex.

Unlike the evidence related to Witness C, plaintiff offers no information to make his argument anything but an attempt to introduce character

1 evidence that the Hearing Panel found not to be relevant. By plaintiff's argument,
 2 every complainant who reports they have been sexually assaulted face a process in
 3 which a respondent is allowed to introduce scores of other partners who said they
 4 were not assaulted by the respondent, so the complainant must be lying.

5 Regardless, the Title IX regulations give college officials explicit
 6 deference to make relevancy determinations on the facts of each matter. Here, the
 7 Hearing Panel considered the evidence and made a relevancy determination that is
 8 consistent with not only the Sexual Harassment Policy but also Title IX. Each
 9 decision to allow evidence or not cannot be proof of gender bias, without more.

10 (2) *It is not procedural error or evidence of anti-male bias*
 11 *for Whitman officials to determine that evidence of*
 12 *Complainant's mental health is not relevant.*

13 The Title IX regulations require that schools approach evidence
 14 related to a party's mental health with consideration for the private, complex, and
 15 potentially prejudicial impact of including such evidence. Under the regulations, a
 16 school in its grievance process "cannot access, consider, disclose, or otherwise use
 17 a party's records that are made or maintained by a physician, psychiatrist,
 18 psychologist, or other recognized professional or paraprofessional acting in the
 19 professional's or paraprofessional's capacity, or assisting in that capacity, and
 20 which are made and maintained in connection with the provision of treatment to
 21 the party, unless the recipient obtains that party's voluntary, written consent to do
 22 so for a grievance process under this section . . ." 34 CFR § 106.45(b)(5)(i).
 23 Therefore, it is far from a matter of right that plaintiff would cross-examine
 24 Complainant's regarding Complainant's mental health, when the natural follow-up
 25 would be that Complainant would be compelled and forced (rather than
 26

1 volunteering and consenting) to introduce additional and rebuttal evidence
2 regarding Complainant's own mental health to defend such evidence.

3 But without needing to reach the point as to whether a party's mental
4 health is ever relevant, this is not procedural error at all let alone error rooted in
5 anti-male bias. If it is automatically procedural error to determine mental health
6 evidence not to be relevant—which is all plaintiff has attempted to argue—then
7 any time a complainant or respondent provides evidence of trauma or impact of
8 sexual assault, they would be subjected to cross-examination and/or expert
9 testimony on their mental health. Regardless, with the little explanation plaintiff
10 offered as to why it would be relevant and the language of the regulations, it is
11 certainly not evidence of bias based on his sex.

12 (3) *It is not procedural error or evidence of anti-male bias*
13 *for the Hearing Panel to determine that a witness's*
earlier statement to the investigator is more credible.

14 As summarized in the investigation report, Witness G was provided a
15 copy of her interview transcript and the opportunity to edit, add, or adjust anything
16 in it, which she declined. Doe Decl., Ex. 1 at 50. After review, Witness G
17 responded, "Those look good to me." *Id.* As described in the Statement of
18 Findings, the Hearing Panel was provided all statements and made a reasoned
19 determination as to which were more credible:

20 "Witness G testified at the hearing that Respondent's advisor spoke with
21 Witness G about how to revise her statement and reviewed the revisions via
22 email before Witness G emailed them to the investigator. **The panel**
23 **determined that Witness G's original statements were credible and**
24 **relevant, and that Witness G's revised and retracted statement as not**
25 **credible due to the extended period of time between the two statements,**
26 **Witness G's original approval of her statement, and Respondent**
Advisor's role in revising and retracting Witness G's statement."

1 Doe Decl., Ex. 3 at 12 (emphasis added). The decision to find Witness G’s later
 2 statement not as credible is within the role of the Hearing Panel and is anything but
 3 “frankly bizarre” if one is informed of the facts as well as plaintiff’s counsel’s role
 4 in its development. This is not procedural error nor is it evidence of bias.

5 (4) It is not procedural error or evidence of anti-male bias
 6 for Murphy to include a short, bullet pointed list that
 7 summarized some witness testimony.

8 The Sexual Harassment Policy states that the investigator will “gather,
 9 assess, and synthesize evidence.” Doe Decl., Ex. 6 at 30. Consistent with that,
 10 Murphy included a half-page section titled “Credibility Considerations” in the
 11 report. Doe Decl., Ex. 1 at 67. In this section, Murphy gathered witness testimony
 12 and grouped it in a short, bullet-pointed list that “the decisionmaker(s) may want to
 13 consider.” It offered no more treatment than organizing what is already available
 14 to the panel in the transcripts of the witness interviews themselves.

15 Plaintiff’s objection to this compilation and his assertion that it is
 16 evidence of bias against him is unfounded. His objection further omits that the
 17 section also includes a bullet point that notes that the Complainant and Witness C
 18 spoke to each other about their alleged experiences with Respondent prior to being
 19 interviewed. Doe Decl., Ex. 1 at 67. Plaintiff also fails to mention in his motion
 20 and does not object to Murphy’s “synthesize[d]” evidence in other sections of the
 21 report that include evidence that he may see as favorable for him, entitled
 22 “Possible Motives Attributed to Complainant.”

23 (5) It is not procedural error or evidence of anti-male bias
 24 for the investigator to interview witnesses that the
 25 investigator determines to be relevant to the allegations.

26 Plaintiff’s complaint alleges that Whitman “fail[ed] to interview
 witnesses identified by Doe that would have provided exculpatory evidence.”

1 Complaint at ¶ 103(f). His motion does not refer to this alleged fact to support his
 2 likelihood of success on the merits of his Title IX claim, nor should it. As with the
 3 above four items, decisions made regarding the relevancy of the potential
 4 information offered by certain witnesses are exactly the types of decisions that are
 5 within the discretion of a college official in a Title IX proceeding. Plaintiff offers
 6 no additional information—other than his own claims of their relevancy—to
 7 transform the exercise of discretion into procedural error based on gender bias.

8 In sum, despite plaintiff’s characterizations, each of the above items is
 9 more accurately described as frustration or second-guessing of decision-making by
 10 Whitman employees related to the relevancy of specific pieces of evidence.
 11 Importantly, they fail to establish—as plaintiff must do—that he was subject to
 12 discrimination on the basis of sex. *Doe v. Oregon State Univ.*, 614 F. Supp. 3d
 13 847, 857 (D. Or. 2022) (“That Plaintiff was frustrated with the process he received
 14 during the [Title IX] investigation does not, by itself, mean that the process was
 15 gender-biased.”). Plaintiff has not brought facts to demonstrate the type of sex-
 16 based decision-making on which the *Schwake* and *Regents* courts relied, and he
 17 therefore fails to meet the heightened standard necessary to obtain a TRO.

18
 19 2. Plaintiff Cannot Show He Is Likely to Succeed on the Merits of His
Breach of Contract Claim.

20 a. *Plaintiff has not met his burden to demonstrate that the Sexual*
 21 *Harassment Policy is an enforceable contract with Whitman.*

22 To allege a claim for breach of contract under Washington law,
 23 plaintiff must first establish that he had a valid contract with Whitman and that
 24 Whitman materially breached the contract, causing him damage. *See Lehrer v.*
 25 *State, Dep’t of Soc. & Health Serv.*, 101 Wn. App. 509, 516, 5 P.3d 722 (2000).
 26 The party asserting the existence of such a contract bears the burden of proving

1 each essential element, including the existence of a mutual intention. *Becker v.*
 2 *Washington State Univ.*, 165 Wash. App. 235, 246, 266 P.3d 893, 899 (2011).
 3 Specifically, a plaintiff has the burden to demonstrate that the parties “objectively
 4 manifest[ed] their mutual assent” to “sufficiently definite terms.” *Marquez v.*
 5 *Univ. of Wash.*, 32 Wn. App. 302, 305, 648 P.2d 94 (1982), *review denied*, 97 Wn.
 6 2d 1037 (1982) *cert denied*, 460 U.S. 1013 (1983).

7 Plaintiff asserts that Whitman made “certain promises regarding how
 8 it handled Title IX investigations” in its Sexual Harassment Policy and that those
 9 promises are “part of [the] contract” between plaintiff and Whitman. Complaint at
 10 ¶¶ 93-94. Plaintiff has alleged no facts other than the mere existence of the Sexual
 11 Harassment Policy, which is insufficient to establish mutual assent. In *Doe v.*
 12 *Seattle Univ.*, the District Court of the Western District of Washington found the
 13 student plaintiff had not demonstrated a likelihood of success on the merits of his
 14 breach of contract claim when he also failed to cite to “any Washington law, let
 15 alone any cases from the Ninth Circuit, or any specific language from Seattle
 16 University’s Title IX Policy in support of his argument that the Title IX Policy
 17 created an enforceable contract between Plaintiff and the University.” No. C22-
 18 00750-RSM, 2022 WL 1908828, at *4 (W.D. Wash. June 3, 2022). Plaintiff
 19 similarly does not provide any authority and does not meet the first element of a
 20 breach of contract claim. Therefore, he cannot succeed on its merits.

21 Further, the language of Whitman’s Sexual Harassment Policy
 22 prevents plaintiff from establishing the policy to be an enforceable contract with
 23 him. It explicitly states that Whitman “reserves the right to make changes to this
 24 document as necessary, and once those changes are posted online, they are in
 25 effect . . .” Doe Decl., Ex. 6 at 38. Whitman exerts sole control over the terms of
 26 the Sexual Harassment Policy and updates it as it deems necessary. Beccai Decl.,

¶ 2. It therefore never clearly manifested assent to its terms. *See Doe v. Oregon State University*, 614 F. Supp.3d at 861 (Finding that “by maintaining unilateral control over the terms of the [student conduct] Code, OSU clearly never manifested assent to be bound by it” and expressing skepticism that the sexual misconduct policy and procedures “constituted a contract between Plaintiff and OSU because Plaintiff’s Complaint states that OSU has since updated its [policy], indicating that OSU maintains unilateral control over those provisions as well.”). In fact, the Sexual Harassment Policy disclaims its creation of a contractual right, stating “[t]his document does not create any legally enforceable protections beyond the protection of the background state and federal laws which frame such policies and codes, generally.” Doe Decl., Ex. 6 at 38; *see also Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 230, 685 P.2d 1081, 1088 (1984) (finding employee handbooks that specifically state that nothing therein alters the at-will employment relationship do not create binding contractual terms).

b. *Plaintiff has not met his burden and does not establish that any term of the Sexual Harassment Policy was breached.*

Even if plaintiff could show the Sexual Harassment Policy constitutes an enforceable contract, he has not raised facts that would demonstrate that Whitman violated the terms. While courts in Washington acknowledge that the relationship between a student and a university is primarily contractual in nature, they also recognize that “[t]he student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category.” *Id.* at 900. This is not, however, an opening for a plaintiff to fall short of his burden to establish his breach of contract claim. Instead, courts give colleges “wide latitude and discretion.” *Id.* Given that, “the standard is that of reasonable expectations—what meaning the party making the manifestation . . . should reasonably expect the other

party to give it.” *Becker*, 266 P.3d at 900 (quoting *Marquez*, 648 P.2d at 97 (quotations and citations omitted)). When a college “‘act[s] on its announced expectations,’ there is no liability for breach of contract.” *Doe v. Elson S. Floyd Coll. of Med. at Washington State Univ.*, No. 2:20-CV-00145-SMJ, 2021 WL 3375725, at *5 (E.D. Wash. Aug. 3, 2021) (quoting *Becker*, 266 P.3d at 900).

Here, Whitman acted on its announced expectations. It provided plaintiff the process described in the Sexual Harassment Policy. Plaintiff’s allegations in support of a breach of contract claim duplicate his Title IX claim. Again, plaintiff’s arguments amount to little more than second guessing of Whitman’s decision-making. He can only show that he disagrees with the outcome of the process and the relevancy determinations that Whitman employees made during the process. *Njoroge v. Vocational Training Institutes, Inc.*, No. 2:16-CV-00951-RAJ, 2017 WL 4700297, at *9 (W.D. Wash. Oct. 19, 2017) (finding breach of contract claim by terminated student not based on any policy violation but on the student’s subjective interpretation of the policy).

Allegations that Whitman failed to provide a “prompt, fair, and impartial” process or that Whitman “stacked the deck” against plaintiff are unspecific and unsupported. Whitman acted and made decisions within the language of the Sexual Harassment Policy. Plaintiff has not met his burden to establish facts or law that demonstrate he is likely to succeed on the merits of his breach of contract claim.

3. Plaintiff Cannot Show He Is Likely to Succeed on the Merits of His Breach of the Covenant of Good Faith and Fair Dealing Claim.

Washington courts have consistently held there is no “free-floating” duty of good faith and fair dealing that is unattached to an existing contract. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wash. 2d 171, 177, 94 P.3d 945,

1 949 (2004) (citing *Badgett v. Security State Bank*, 116 Wash.2d 563, 569-70,
 2 807 P.2d 356 (1991)). The duty exists only “in relation to performance of a
 3 specific contract term.” *Keystone*, 94 P.3d at 949 (quoting *Badgett*, 807 P.2d
 4 at 360). As addressed above, plaintiff has not met his burden to establish that a
 5 contract with Whitman exists, and he is therefore unable and unlikely to succeed
 6 on his claim for breach of the covenant of good faith and fair dealing.

7 Further, plaintiff’s stated basis for this claim is that Whitman did not
 8 consider every single factor to decide the sanction. In fact, Whitman did apply
 9 other stated criteria. The Hearing Panel considered additional factors related to
 10 plaintiff, including his submitted statement that acknowledged that he had grown
 11 and matured since the time frame during which the alleged conduct occurred. Doe
 12 Decl., Ex. 3 at 13. Regardless, Whitman’s Sexual Harassment Policy explicitly
 13 states that the listed factors “may [be] include[d]” not that they must be. Doe
 14 Decl., Ex. 6 at 34. Against this clear language that the factors are permissive,
 15 plaintiff cannot establish a breach of the covenant of good faith and fair dealing for
 16 not considering the factors that plaintiff would have to assign him a lesser sanction.
 17 Plaintiff’s basis for this claim is just a second-guessing of the discretion of the
 18 panel—it is that he believes the sanction assigned to him (following a finding of
 19 multiple violations of forcible rape as well as dating violence) is too harsh.

20 To accept this, one would have to agree with plaintiff’s argument that
 21 the sustained policy violations for forcible oral sex and sexual intercourse as well
 22 as dating violence do not represent serious behavior, and a college must always
 23 consider every, single additional listed factors to assign a sanction when
 24 considering similar policy violations or else they are in breach. That is not the
 25 language of the Sexual Harassment Policy nor is it evidence of such a breach. As
 26 stated by the Hearing Panel, the conduct is serious and concerning to Whitman.

1 Whitman does not publish the details of the outcomes of student conduct cases as a
 2 matter of practice, nor could it even do so under privacy laws. A statement that the
 3 decision to sanction plaintiff was “guided more by political pressure and a desire to
 4 appear tough on sexual assault” is unfounded and misplaced.

5 It is not sufficient to base a claim for the breach of the covenant of
 6 good faith and fair dealing on what is essentially second-guessing of the Hearing
 7 Panel’s deliberation and application of permissive factors. Plaintiff’s assertion that
 8 the sanction applied was too severe falls far short of the required showing that he is
 9 likely to succeed on the merits of his claim.

10
 11 4. Plaintiff Cannot Show He Is Likely to Succeed on the Merits of His
Washington Consumer Protection Act Claim.

12 To succeed on a CPA claim, a plaintiff must prove an “(1) unfair or
 13 deceptive act or practice; (2) occurring in trade or commerce; (3) public interest
 14 impact; (4) injury to plaintiff in his or her business or property; (5) causation.”
 15 *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013) (quoting
 16 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778,
 17 780, 719 P.2d 531 (1986)). An unfair or deceptive act is one that had the capacity
 18 to deceive a substantial portion of the public. *Barrett v. Seattle Country Day Sch.*,
 19 125 Wash. App. 1044 (2005).

20 Plaintiff has not established that he is likely to succeed on the merits
 21 of a consumer protection claim relating to the Title IX conduct process at
 22 Whitman. Rather than establish each element, plaintiff’s motion again repeats the
 23 same generalized and conclusory allegation that Whitman was intent on holding
 24 him responsible. This is not enough. The Washington CPA, in name and
 25 substance, applies “only to deceptive acts or practices in the conduct of *trade and*
 26

1 *commerce.*” *Leahy v. Edmonds Sch. Dist.*, No. C07-1970 RSM, 2008 WL
 2 11508397, at *8 (W.D. Wash. Nov. 10, 2008) (citing RCW 19.86.020) (emphasis
 3 added); *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wash. 2d 133, 149,
 4 930 P.2d 288 (1997). And, “[t]o be liable under the CPA, there must be a
 5 contractual relationship between the parties.” *International Ultimate, Inc. v.*
 6 *St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 758, 87 P.3d 774 (2004). As
 7 addressed above, Plaintiff has failed to establish a contract with Whitman.

8 Washington courts have been clear that the CPA is not intended to
 9 provide remedies for injuries to a person but only for injuries sustained in one’s
 10 business or property. *Leahy*, 2008 WL 11508397, at *9 (citing *Washington State*
 11 *Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wash. 2d 299, 318
 12 858 P.2d 1054 (1993)). In *Leahy*, much like here, the plaintiffs alleged a financial
 13 injury in that they had to spend considerable amounts of money to address unfair
 14 acts of the school district but not the type of injury to business or property
 15 contemplated by the statute. *Id.* at *8; *see also Stevens v. Hyde Athletic Indus.,*
 16 *Inc.*, 54 Wash. App. 366, 370, 773 P.2d 871, 872-73 (1989) (“Had the Legislature
 17 intended to include actions for personal injury within the coverage of the CPA, it
 18 would have used a less restrictive phrase than “business or property.”). As in
 19 *Leahy*, plaintiff also “falls significantly short of even attempting to show how the
 20 facts of this case apply to the elements of a valid CPA claim.” *Id.* at *9.

21 **C. PLAINTIFF HAS NOT MADE THE REQUIRED SHOWING FOR A** 22 **TRO**

- 23 1. Plaintiff will not suffer irreparable harm if an injunction is not
 24 granted.

25 “Irreparable harm is traditionally defined as harm for which there is
 26 no adequate legal remedy.” *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053,

1 1068 (9th Cir. 2014). Relief as extraordinary as a TRO is only appropriate where
 2 the threat of harm is “immediate.” *Caribbean Marine Servs. Co. v. Baldrige*,
 3 844 F.2d 668, 674 (9th Cir. 1988). A plaintiff seeking injunctive relief must
 4 “demonstrate that irreparable injury is *likely* in the absence of an injunction.”
 5 *Winter*, 555 U.S. at 22 (emphasis in original). The primary argument offered by
 6 plaintiff in support a TRO is the proximity to his anticipated graduation. That is
 7 not enough. If a plaintiff need only demonstrate proximity to graduation to
 8 establish irreparable harm, every student who did not pass a course in time to
 9 graduate could obtain the extraordinary relief of an emergency injunction because
 10 each of those students would suffer the same harm.

11 Plaintiff has received the benefit of several semesters of courses and
 12 resulting academic credit such that he would not be starting at zero should he
 13 transfer to another institution—far from it. As plaintiff acknowledges, he also
 14 continued to attend classes during the pendency of the investigation, hearing, and
 15 appeal—it is only after the full process came to an ultimate determination of
 16 plaintiff’s responsibility for the serious conduct violations that the college removed
 17 Plaintiff from its community. He can receive a degree from another institution
 18 using the credits he earned at Whitman or, should he be successful in his lawsuit
 19 against Whitman, he can receive a degree from Whitman. The mere dismissal
 20 from a school, like the mere loss of employment, does not in and of itself constitute
 21 irreparable harm sufficient to warrant a TRO.

22 The mere “possibility” of irreparable harm or of a “speculative injury”
 23 is not enough to justify injunctive relief. *See Winter*, 555 U.S. at 22; *In re Excel*
 24 *Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007). Potential questions by a
 25 future employer asking why he did not complete his degree in four years are not
 26 only speculative—they are unlikely. College students take breaks including

1 medical or other personal leaves during their academic progression with increasing
 2 frequency, particularly for students, like plaintiff, who attended college during the
 3 pandemic. In *Doe v. Siena College*, a case cited by plaintiff in support of his
 4 assertion of irreparable harm, the harm was much less speculative – the plaintiff
 5 had identified a specific job he was set to begin in summer of 2023 that was
 6 contingent upon his graduation in May 2023. No. 122CV1115BKSTWD, 2023
 7 WL 197461, at *13 (N.D.N.Y. Jan. 17, 2023). Plaintiff has not brought this court
 8 similar facts to transform his speculation into a demonstration of irreparable harm.

9 Finally, none of the cases cited by plaintiff involve the same delay
 10 exhibited by plaintiff in pursuing a TRO. Plaintiff simply cannot meet the standard
 11 of irreparable harm while also waiting to file his complaint and motion for several
 12 weeks after he was aware the decision was final. Plaintiff was informed by
 13 March 22, 2023, letter of the Appeal Panel’s decision. Doe Decl., Ex. 5. On
 14 March 29, 2023, plaintiff’s counsel provided Whitman’s counsel a draft complaint
 15 and motion for TRO. Declaration of Michael Porter in Support of Defendant’s
 16 Opposition to Plaintiff’s Motion for Temporary Restraining Order (“Porter Decl.”),
 17 ¶ 2, Ex. A. But plaintiff waited almost two more weeks to file and then chose to
 18 file by mail. Porter Decl., ¶ 3, Ex. B. Plaintiff’s counsel did not provide Whitman
 19 with the filed complaint, summons, and acceptance of service form until April 17,
 20 2023. Porter Decl., ¶ 4, Ex. C.

21 In *Bacon v. Woodward*, this Court held that where the plaintiffs filed
 22 their complaint for several weeks after receiving notice of the basis of their claim
 23 and then another four days to effectuate proper service on defendants, their
 24 “dilatatory litigation practices impl[y] a lack of urgency and irreparable harm.”
 25 No. 2:21-CV-0296-TOR, 2021 WL 5183059, at *6 (E.D. Wash. Nov. 8, 2021)
 26 (citations omitted). The Court should similarly find here that plaintiff’s more than

1 three-week delay implies a lack of urgency and a lack of irreparable harm. Time is
 2 not of the essence, and irreparable harm will not befall plaintiff should this case
 3 proceed without the extraordinary intervention of a TRO.

4 2. The Balance of Equities and the Public Interest Favor Whitman and
 5 Do Not Favor a “Middle Ground.”

6 Title IX is a federal law that requires educational institutions that
 7 receive federal funds to operate their education programs or activities in a manner
 8 free of discrimination based on sex, including sexual harassment (which is defined
 9 to include sexual assault and dating violence). To meet its obligations under Title
 10 IX, if an institution is aware, or should be aware, of sexual harassment in its
 11 campus community, its obligations are three-fold – it must take prompt and
 12 effective action to end any sex discrimination in its education program or activity,
 13 prevent its recurrence, and remedy its effects.

14 Therefore, when a college receives a report of concerns within its
 15 community, an institution must be able to respond and to pursue disciplinary
 16 proceedings that follow their stated policies and procedures without defending a
 17 motion for a TRO each time. In *Doe v. Seattle University*, the plaintiff male
 18 respondent sought a TRO to reinstate him under similar facts, after the private
 19 university applied and followed its Title IX policies and process to find the student
 20 responsible for sexual offenses and to issue sanctions. 2022 WL 1908828 at *1.
 21 The District Court of the Western District of Washington denied the TRO. It
 22 found that the balance of equities did not favor the plaintiff student and expressed
 23 caution that “[i]ssuing a TRO in this case, and in others similar to it, would likely
 24 interfere with Seattle University’s ability to enforce its disciplinary standards and
 25 its ability to carry out its legal obligation under Title IX to respond to sexual
 26 harassment.” *Id.*, at *6. The same caution should apply here. The balance of

1 equities favors Whitman's ability to meet its obligations under federal law and to
2 address conduct within its community when it arises, particularly as here when the
3 manner of addressing it includes such a robust and thorough process.

4 Plaintiff's declaration and motion present an incomplete picture of his
5 suggested option that ignores that a college has obligations to multiple parties,
6 many of whom are not in front of the court. Plaintiff wrongly dismisses the impact
7 to Complainant at stake in the court's decision whether to issue a TRO. It is not
8 uncommon for a complainant who reports that she or he was sexually assaulted at
9 an educational institution to thereafter leave that institution *because of* the sexual
10 assault. In fact, Complainant provided evidence in the process connecting
11 plaintiff's conduct to Complainant's inability to continue a successful academic
12 career and ultimate decision to withdraw from Whitman. Plaintiff is now using
13 Complainant's departure in his favor. Allowing a complainant's departure from an
14 institution to be a basis for granting a TRO is a narrow view of harm and does not
15 recognize the impact on parties who are not in front of this court.

16 Title IX's requirement that institutions preserve access to education
17 means that they must provide "remedies to a complainant where a determination of
18 responsibility for sexual harassment has been made against the respondent,"
19 including remedies that "must be designed to restore or preserve equal access to
20 the recipient's education program or activity." 34 CFR 106.45(b)(1)(i). The
21 Hearing Panel noted in its decision that Whitman should "evaluate Complainant's
22 ability to return to Whitman to continue their academic pursuits, and to address
23 appropriate remedies that will pave a path for their potential return." Doe Decl.
24 Ex. 3 at 13. Further, Whitman has obligations under the Title IX regulations and
25 its own Sexual Harassment Policy to provide a written determination regarding
26 responsibility to both parties simultaneously that includes the sanction assigned.

1 Complainant received the Statement of Findings that indicated Whitman's decision
2 to dismiss plaintiff, and a TRO that allowed plaintiff to finish his coursework and
3 walk away would completely reverse that determination. Allowing plaintiff to
4 complete his coursework remotely and walk away from Whitman is not a middle
5 ground—it is, essentially, not a sanction.

6 The outcome of this student conduct case does not exist in a silo. In
7 addition to respondent, it impacts Complainant, it impacts the college's legal
8 obligations described above, it impacts the Whitman's ability to make decisions to
9 promote a safe campus community, it impacts the community's trust in Whitman,
10 and it impacts Whitman's ability to address other instances of similar sexual
11 misconduct in its community and to issue sanctions consistently and fairly.
12 Reinstatement of respondent after he was found responsible for forcible rape and
13 dating violence—even if for remote learning—will be known by members of the
14 Whitman community, and it will have an impact. For survivors of sexual assault to
15 come forward and participate in a college's reporting and grievance processes, they
16 trust that a full, fair, and equitable process will follow. Assertions by plaintiff that
17 he has not assaulted *anyone else* at Whitman since dating plaintiff again gloss over
18 the serious conduct for which he was found responsible.

19 The public interest lies in a college's ability to enforce its disciplinary
20 standards and policies to comply with Title IX, to provide a campus community
21 that is free from sexual harassment, misconduct, and violence, and to promote trust
22 in its process that encourages community members to report concerns. Therefore,
23 the public interest weighs against providing relief to plaintiff here because of the
24 great disruption and cost to Whitman's obligations and to parties not in front of the
25 court.
26

1 3. The Balance of Factors Weigh Against the Issuance of a TRO.

2 As addressed above, the Court should find that the factors, when
3 balanced against each other, do not weigh in favor of granting a TRO. Even if
4 plaintiff will experience some harm should the court not intervene, that is not
5 enough and cannot be enough. A demonstration of impact or harm, in isolation,
6 cannot be the sole factor for issuance of a TRO. *See Doe v. Seattle Univ.*, 2022
7 WL 1908828, at *7 (“Even if the court were to agree with plaintiff that he may
8 suffer irreparable harm in the absence of a TRO, the Court cannot find that the
9 factors, when balanced against each other, weigh in his favor.”).

10 If it were, every employee who is terminated from employment and
11 every student who is dismissed from a university – for any reason – could seek and
12 obtain the extraordinary relief and disruptive intervention of a TRO from the court.
13 And specifically, a college would face a litigation risk any time it imposed
14 discipline on a student who was close to graduation. A TRO should not a
15 mechanism for what amounts to an “appeal” of Whitman’s decision following it
16 thorough multi-step process designed that complies with Title IX.

17 Academic courses at Whitman are generally in-person. While
18 individual and temporary accommodations may be provided in some circumstances
19 to meet obligations including under the ADA or Section 504, remote learning is
20 not a matter of right nor are all courses set up for remote, virtual learning. Even
21 so, the mere possibility of remote attendance is not reason to require Whitman to
22 provide it here.² Remote participation in a college’s programs and activities by
23 students who have been found responsible for serious conduct like sexual assault is

24 _____
25 ² At the time of submission, the undersigned understands that Whitman’s academic
26 courses to be in-person, and the expectation is that students attend in person. To
the extent additional information on the availability of remote learning is learned
prior the hearing, Whitman’s counsel may supplement this information.

1 still participation in a college's community and in classes interacting with other
 2 students. It renders a college's discipline standards and sanctions almost
 3 meaningless because of technology. Remote attendance is equivalent to
 4 reinstatement, which is equivalent to no actual sanction following a finding of
 5 forcible rape and dating violence. Accordingly, the Court should find that the
 6 balance of factors weighs against the issuance of a temporary restraining order.

7
 8 4. Plaintiff Cannot Meet the Required Factors of Either Test.

9 The sliding scale test of *Cottrell* is available only when the balance of
 10 equities tips "sharply" in the plaintiff's favor and there are "serious questions
 11 going to the merits," and even then, only assuming the plaintiff also satisfies the
 12 two other factors of irreparable harm and public interest. *Wilkinson*, 2023 WL
 13 2562387, at *2 (quoting *Cottrell*, 632 F.3d at 1135). As discussed above, the
 14 balance of equities favors Whitman. The *Cottrell* test is therefore not available to
 15 plaintiff to obtain a TRO. Even under this test, a court will not grant a preliminary
 16 injunction unless the public interests in favor of granting an injunction "outweigh
 17 other public interests that cut in favor of *not* issuing the injunction." *Bacon*, 2021
 18 WL 5183059, at *6 (quoting *Cottrell*, 632 F.3d at 1138) (emphasis in original).

19 **IV. CONCLUSION**

20 The motion should be denied, and a scheduling order for briefing on a
 21 motion to dismiss should be entered if plaintiff intends to pursue his claims.

22 DATED: April 23, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I declare under penalty of perjury under the laws of the United States of America and the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington, April 23, 2023.

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